STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Whitbeck, P.J., and Smolenski and Copper, JJ.

PAUL DRESSEL and
THERESA DRESSEL,

Plaintiffs-Appellees,

v.

AMERIBANK,

Defendant-Appellant.
_____/

Supreme Court Case No. 119959

Court of Appeals Case No. 222447

Kent County Circuit Court
Lower Court No. 98-013017-CP

BRIEF OF NATIONAL CONSUMER LAW CENTER AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AMICI CURIAE, IN SUPPORT OF PAUL AND THERESA DRESSEL

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STATEMENT OF INTEREST

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the needs of consumers, especially low income and elderly consumers. For over 30 years the NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical legal support.

The NCLC staff provides a wide range of direct assistance to consumer law attorneys, including consultation on legal issues, co-counseling, expert testimony, legal research, continuing legal education, widely respected treatises, and technical support. NCLC gives priority to providing case assistance and training targeted at legal aid and pro bono attorneys representing low-income clients.

NCLC is a nonprofit corporation founded in 1969 at Boston College School of Law. Under IRS laws, the Center is a 501(c)(3) and legal aid organization. Our staff of 16 attorneys combines over 160 cumulative years of specialized consumer law expertise. We address the legal problems faced daily by low-income and financially distressed families ranging from illicit contract terms and charges, home improvement frauds, repossessions, debt collection abuses, usury, mortgage equity scams, and bankruptcy to utility terminations, fuel assistance benefit programs, and utility rate structures, as well as many subjects in between.

NCLC is author of the widely praised sixteen-volume *Consumer Credit and Sales Legal Practice Series*. These treatises on consumer law are sent to most legal aid offices throughout the country, are widely used by the private bar, and are available by subscription. The sixteen

volumes include the NCLC's *Unfair and Deceptive Acts and Practices* (5th ed. 2001). These treatises are supplemented by *NCLC Reports*, issued twenty-four times each year in four separate editions. The courts are recognizing the treatises with increased frequency. For example, NCLC's *Truth in Lending* (4th ed. 1999) was recently relied upon by the United States Court of Appeals, Sixth Circuit, in *Pfennig v. Household Credit Services, Inc.*, 286 F.3d 340, 347 (6th Cir. 2002).

NCLC was the Federal Trade Commission's designated consumer representative in promulgating its Trade Regulation Rules on Creditor Remedies, 16 C.F.R. 444, and Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433. The Center's Model Consumer Credit Code was the foundation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*.

NCLC staff has served on a number of committees of the National Conference of Commissioners on Uniform State Law, the American Bar Association Business Law Section, and on the Energy and Transportation Task Force of the President's Council on Sustainable Development. More Center staff have been appointed by the Board of Governors of the Federal Reserve System to their statutory Consumer-Industry Advisory Committee than any two other organizations combined. Present and former Center staff have held or hold public, appointed positions of authority.

NCLC is recognized nationally as a preeminent expert in consumer credit legal analysis, and has drawn on this expertise to provide information, analysis and market insights to federal and state legislatures, administrative agencies and the courts for nearly 30 years. In view of its widely recognized expertise, NCLC frequently is asked to appear as amicus curiae in consumer

law cases before trial and appellate courts and does so in appropriate circumstances.

The members of the National Association of Consumer Advocates ("NACA") are private, public sector and legal services attorneys, and law professors and students, whose primary practice involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused on issues which concern abusive and fraudulent practices by businesses that provide financial and credit-related products and services.

JURISDICTIONAL STATEMENT

NCLC and NACA adopt the jurisdictional statement set forth in Appellant's Brief.

STANDARD OF REVIEW

NCLC and NACA adopt the standard of review set forth in Appellees' Brief.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

NCLC and NACA adopt the counter-statement of questions presented set forth in Appellees' Brief. Further, NCLC and NACA respond to the third of Appellees' counter-statement of questions presented, as follows:

3. Are mortgage lenders who engage in the unauthorized practice of law by charging a fee for the preparation of legal documents subject to a remedy under the

Consumer Protection Act?

Appellant answers "No."

Appellees answer "Yes."

The Court of Appeals answers "Yes."

Amici Curiae NCLC and NACA answer "Yes."

COUNTER-STATEMENT OF FACTS

NCLC and NACA adopt the counter-statement of facts set forth in Appellees' Brief.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS

NCLC and NACA adopt the counter-statement of material proceedings set forth in Appellees' Brief.

ARGUMENT

I. The Michigan Consumer Protection Act is a remedial statute which must be liberally construed to achieve its intended goal of protecting consumers.

All fifty states have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace. Jonathan Sheldon & Carolyn L. Carter, National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 1.1, at 1 (5th ed. 2001). Most of these consumer protection statutes were enacted in the ten-year span of the mid-1960s to the mid-1970s. *Id.* The legislatures made these statutes broad and flexible to insure continued application to creative, new forms of abusive business schemes. *Id.*

The Michigan Consumer Protection Act ("MCPA"), M.C.L. § 445.901 *et seq.* which became effective on April 1, 1977, is described in its preamble as "An act to prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties."

The MCPA contains an extensive list of methods, acts or practices in the conduct of trade or commerce which it deems unfair, unconscionable or deceptive, and therefore unlawful. M.C.L. § 445.903(1). The MCPA defines "trade or commerce" to mean the conduct of a business providing goods, property or service primarily for personal, family or household services. M.C.L. § 445.902(d)

The MCPA expressly provides for the maintenance of class actions. M.C.L. § 445.911(3). This Court has emphasized the importance of this class action provision as well as confirmed that the MCPA is a remedial statute which must be liberally construed to achieve its intended goals. :

> The Consumer Protection Act was enacted to provide an enlarged

> remedy for consumers who are mulcted by deceptive business practices, and it specifically provides for the maintenance of class actions. This remedial provision of the Consumer Protection Act should be construed liberally to broaden the consumer's remedy, especially in situations involving consumer frauds affecting a large number of persons.

Dix v. American Bankers Life Assurance Company of Florida, 429 Mich. 410, 417-18, 415 NW2d 206, 209 (1987) (footnotes omitted).

II. Mortgage lenders who engage in the unauthorized practice of law by charging a fee for the preparation of legal documents are subject to a remedy under the Michigan Consumer Protection Act.

AmeriBank does not dispute that the home loan it made to Paul and Theresa Dressel constituted "trade or commerce" as defined at M.C.L. § 445.902(d). Thus, the transaction was *prima facie* subject to the MCPA. Nonetheless, AmeriBank argues that the transaction was not subject to the MCPA (Appellant's Brief, pp. 23-33). AmeriBank relies upon Section 4 of the MCPA which "exempts" certain transactions from its coverage. Specifically, the MCPA provides a general exemption from coverage which states that the Act does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." M.C.L. § 445.904(1)(a). Ameribank argues that it was entitled to the general exemption, relying on the Court of Appeals determination that it was "specifically authorized to make loans, M.C.L. 487.3401, and regulated by the Financial Institutions Bureau of this state as well as federal authorities, M.C.L. 445.1601 *et seq.*" (Appellant's Brief, pp. 24-25). AmeriBank has the burden of proving that it qualified for the exemption. M.C.L. § 445.904(4).

AmeriBank's argument is without merit because the general exemption of M.C.L. § 445.904(1)(a) does not apply in this case. NCLC and NACA submit that there are several reasons

why this Court should find that the exemption did not apply and that the transaction between AmeriBank and the Dressel's was subject to the MCPA.

AmeriBank claims a general exemption simply because lending is subject to governmental regulation. If this Court agrees with AmeriBank, the MCPA will be eviscerated. It is difficult to imagine any transaction which is not subject to governmental regulation at some level. If the general exemption of M.C.L. § 445.904(1)(a) were to be given the expansive reading urged by AmeriBank, virtually every transaction would be exempt from MCPA coverage. Certainly, the Legislature did not intend for the MCPA to cover nothing. To the contrary, a review of the extensive list of methods, acts or practices in the conduct of trade or commerce which the Legislature deemed unfair, unconscionable or deceptive, and therefore unlawful, and as enumerated in M.C.L. § 445.903(1), makes clear that the Legislature intended the MCPA to cover a broad range of consumer transactions.

AmeriBank's extreme position is based on *Smith v. Globe Life Insurance Company,* 460 Mich 446, 597 NW2d 28 (1999), wherein this Court held that M.C.L. § 445.904(1)(a) provided an exemption from the application of the MCPA if "the general transaction is specifically authorized by law, regardless of whether the specific conduct alleged is prohibited." *Smith*, 460 Mich at 465, 597 NW2d at 38. However, a careful reading of *Smith* discloses that the Court was not willing to give the general exemption of M.C.L. § 445.904(1)(a) the expansive reading now being urged by AmeriBank. Indeed, the Court's narrower holding is apparent when the majority's opinion is read in conjunction with Judge Cavanagh's concurring/dissenting opinion which states in pertinent part as follows:

> Under the majority view, any activity that is *regulated* by a regulatory board or officer acting under statutory authority of this state or the United

> States, is specifically authorized. . . . I suggest the majority cannot provide meaningful examples where a consumer would not be blocked by subsection 4(1)(a) under its reading of the terms "specifically authorized."
>
> * * *
>
> In simple terms, the MCPA protects consumers from unfair business practices regarding the sale of personal, family, or household goods or services. Because such businesses are regulated, the consumer has little or no redress under the provisions of the MCPA according to the majority.

Smith, 460 Mich at 480-81, 597 NW2d at 45 (J. Cavanagh, Dissenting) (emphasis in original).

In response to Judge Cavanagh's criticism, the *Smith* majority intimated that it did not intend to eviscerate the MCPA, by making clear that it was giving the general exemption of M.C.L. § 445.904(1)(a) a more narrow reading:

> Judge Cavanagh's concurrence, *post* at 45, argues that, "under the majority's interpretation of 'transaction or conduct,' the defendant's conduct [in *Temborius*] would be exempt [from the MCPA] under subsection 4(1)(a) because the sale of automobiles is specifically authorized by the Secretary of State. . . ." The concurrence, *post* at 45 further invites us to "provide meaningful examples where a consumer would not be blocked by subsection 4(1)(a). . . ." We need not reach or otherwise address consumer transactions that are not before us because it is clear *in this case* that the sale of credit life insurance *is* "specifically authorized" under the Credit Insurance Act, which is administered by the insurance commissioner.
>
> * * *
>
> Thus, it is clear that, contrary to the position of the concurrence, *post* at 45, insurance companies are not "[l]ike most businesses."

Smith, 460 Mich at 465, 597 NW2d at 38, fn. 12. If insurance companies are not like most businesses, it is submitted that insurance companies are not like banks, either.

Further evidence that the Legislature intended to subject banks to the MCPA is found in

M.C.L. § 445.917(1), which states that the commissioner of the financial institutions bureau is empowered to "investigate . . . a state or federally chartered bank . . . which the commissioner believes has engaged, is engaging, or is about to engage in a method, act, or practice which is unlawful under this act." If banks can engage in conduct which violates the MCPA, then it necessarily follows that the Legislature intended to subject banks to the MCPA. AmeriBank should not be granted an exemption.

Similarly, M.C.L. § 445.917(3) requires that "[u]pon conclusion of an investigation, the commissioner [of the Financial Institutions Bureau] shall provide a full report to the attorney general." Then, "[w]hen the attorney general has probable cause to believe that a person has engaged, is engaging, or is about to engage in a method, act, or practice which is unlawful pursuant to section 3," the attorney general may bring an appropriate court action. M.C.L. § 445.905. It would make no sense to require the commissioner to provide a full report to the attorney general regarding a bank's practices which violate the MCPA, unless the attorney general has the ability to exercise its power to bring an enforcement action under the MCPA. Accordingly, the Legislature must have

intended the MCPA to apply to bank transactions.

AmeriBank would have the Court believe that the Legislature intended the bank's transactions to be exempt from the MCPA because banks are regulated by the Financial Institutions Bureau (now, Office of Financial and Insurance Services). Ameribank implies that the regulatory body provided sufficient consumer protection, such that there was no need to apply the MCPA to banks. In reality, AmeriBank seeks to eliminate the only method whereby it and other lenders actually are made accountable for deceptive practices.

If the Dressel's had complained to the Financial Institutions Bureau that AmeriBank had charged them an unlawful fee in connection with the preparation of legal documents, the NCLC and NACA know from experience that the regulatory body would have had neither the resources nor inclination to pursue resolution of the claim.[1] The Legislature knew this when it passed the MCPA. Accordingly, the Legislature devised a "private attorneys general" system that encourages the affected individual to accept an active role where his own material well-being is at stake, while minimizing the regulatory costs to taxpayers and placing the direct costs of enforcement on those who are found to violate the MCPA.

This system of enforcement through private attorneys general is commonly employed in state and federal consumer protection statutes. Enforcement is encouraged by mandatory statutory damages and the recovery of reasonable attorney's fees and costs by the successful consumer. For example, as stated by Sixth Circuit in regard to the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*:

> The purpose of the statutory recovery is "to encourage lawsuits by individual consumers as a means of enforcing creditor compliance with the [TILA]." . . . The TILA also permits recovery of reasonable attorney's fees and costs. . . .

Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 800 (6th Cir. 1996) (citations omitted).

The Michigan Legislature has employed a system of private attorneys general in a variety of consumer related statutes. Examples of statutes which provide for an award of statutory damages, costs and attorney fees to the prevailing consumer include the MCPA, M.C.L. § 445.911, the Michigan Credit Reform Act, M.C.L. § 445.1861, and the Michigan Pricing and Advertising Act, M.C.L. § 445.360.

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[1] It is worth noting that unlike the Insurance Code which was implicated in *Smith, supra,* the banking statutes do not contain their own, independent consumer protection provisions mirroring the MCPA.

AmeriBank's unlawful lending practices went undetected and unopposed until Mr. and Mrs. Dressel accepted the private attorney general role that the Legislature offered and encouraged them to take. AmeriBank now seeks to eliminate all meaningful oversight of its practices by requesting exemption from the MCPA. NCLC and NACA submit that a plain reading of the MCPA as well as public policy considerations demand that AmeriBank remain subject to the MCPA and not be allowed to operate virtually unfettered in the market place, free from the likelihood of sanctions for its deceptive practices.

CONCLUSION

NCLC and NACA urge this Court to limit the holding in *Smith* and reject AmeriBank's plea for a general exemption from the MCPA by affirming the Legislature's stated purpose of protecting Michigan consumers from deceptive practices in trade and commerce and by finding that the MCPA does indeed apply to the great majority of business transactions conducting in the state, including loan transactions conducted by banks such as Ameribank.

Dated: July 18, 2002

Respectfully submitted,

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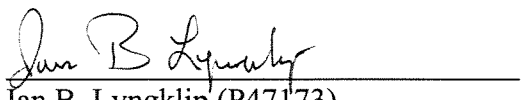
By: 
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